Supreme Court, U.S.
FILED
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No. 97-349

In The

Supreme Court of the United States

October Term, 1996

A. DAVID SILVER,

Petitioner,

vs.

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, an Indiana Corporation, in its individual capacity and as assignee of the SANTA FE PRIVATE EQUITY FUND II, L.P., a New Mexico limited partnership,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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24 pp

QUESTION PRESENTED

Respondent, The Lincoln National Life Insurance Company, disagrees that the Petition for a Writ of Certiorari (the "Petition") filed by A. David Silver ("Silver") states a question that will require this Court to resolve a conflict among the Circuits, or that will resolve this case. Silver's question is premised on an incorrect assumption. Pursuant to Fed. R. Civ. P. 38(b), a party must serve a jury demand within ten days after service of the last pleading directed to any issues triable to a jury to preserve its right to a jury trial. Silver's question incorrectly assumes what the "last pleading" was. The Seventh Circuit agreed with Silver that had his jury demand been timely, Rule 38(b) would have applied. However, that court held that the "last pleading" had been filed six months before Silver filed his jury demand.

STATEMENT PURSUANT TO RULE 29.6

The Lincoln National Life Insurance Company is wholly owned by Lincoln National Corporation, a publicly held corporation. The Lincoln National Life Insurance Company has no nonwholly owned subsidiaries.

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APPENDIX

Appendix A — Relevant Docket Entries 1a

Respondent, The Lincoln National Life Insurance Company ("Lincoln") respectfully requests that this Court deny A. David Silver's Petition.

STATEMENT OF THE CASE

The Statement of the Case provided by Petitioner, A. David Silver ("Silver"), does not set out all the facts material to the consideration of the question presented. This case arose out of the activities of defendants A. David Silver ("Silver") and ADS Partners, L.P. ("ADSP"), in connection with a venture capital limited partnership, the Santa Fe Private Equity Fund II ("SFPEF II"). On September 23, 1986, Lincoln, an investor of SFPEF II, filed its complaint alleging that Silver committed multiple acts of securities, bank, mail and wire fraud over a two-year period in furtherance of several schemes designed to save financially-troubled entities controlled by Silver and to shield Silver from personal liability.[1] ADSP and SFPEF II were also named as defendants. Lincoln filed an Amended Complaint containing substantially the same claims six days later, on September 29, 1986.

Silver was served with the Amended Complaint on October 16, 1986. On November 17, 1986, Silver, by his counsel, Altheimer & Gray, moved for an extension of time to answer or otherwise plead. Also on November 17, 1986, Silver filed a motion to transfer or dismiss Count IV, claiming that Count IV was not brought within the applicable statute of limitations. Count IV of the Amended Complaint was a claim for rescission brought under the Illinois Securities Act. 815 ILCS 5/2.1, *et seq*. The issues raised in Count IV are identical to the issues

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1. Excerpts of the docket sheet from the United States District Court for the Northern District of Illinois showing the relevant docket entries are included at App. A at p. 1a.

raised in Count III, brought under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(j)(b). On December 1, 1986, Silver filed his Answer to Counts I, II, III and V of Lincoln's Amended Complaint. Silver did not demand a jury within 10 days of the filing of this Answer.

Silver's motion to dismiss Count IV was denied on January 13, 1987. Defendant SFPEF II then filed an untimely counterclaim by permission on February 4, 1987. That counterclaim did not contain a jury demand. [2]

On May 21, 1987, Silver, by his new lawyers, Chadwell & Kayser, filed an Answer to Count IV of the Amended Complaint. That Answer did not contain a jury demand. Silver then filed an untimely compulsory counterclaim on June 1, 1987. That Counterclaim, bearing the notation "JURY TRIAL DEMANDED" on its face, also contained the notation "COUNTERCLAIMANTS SILVER AND ADSP DEMAND TRIAL BY JURY" on the final page.

On August 25, 1988, Lincoln filed a Second Amended Complaint. This Complaint added RICO causes of action and added new defendants. When Silver filed his Answer to the Second Amended Complaint, he was represented by the law firm Sachnoff Weaver & Rubenstein, Ltd. Thus, Silver was represented by counsel at all the critical pleading stages. He did not file a jury demand within 10 days of filing this Answer.[3]

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2. In February 1987, SFPEF II's limited partners voted unanimously to remove ADSP and Silver as its general partners and SFPEF II was placed into receivership. Later that year, all of SFPEF II's claims against Silver and ADSP were assigned to Lincoln.

3. The new defendants did not answer the Second Amended Complaint. They entered into a settlement agreement with Lincoln and were dismissed from the case.

Lincoln was granted summary judgment on Silver's Counterclaim on October 31, 1991. The parties disagreed as to whether the case would be tried to a jury. Shortly before the Final Pretrial Order was entered, Silver asked for and was given leave to file a brief as to why the case should be tried by a jury. The District Judge treated Silver's November 1992 request as a motion for a jury trial and denied the motion on July 15, 1993.

In denying the motion for a jury trial, the District Court ruled that the last pleading directed to any issues triable by a jury was Silver's Answer filed December 1, 1986. Thus, the court held that, pursuant to Fed. R. Civ. P. 38(d), Silver waived his right to demand a jury by failing to demand one not later than 10 days after service of the Answer.

The case was tried by the court beginning August 16, 1993. After two consecutive weeks of trial, during which extensive evidence was taken, the District Court accommodated Silver by granting two nearly month-long continuances to present additional evidence. Detailed proposed findings of fact and conclusions of law were filed by the parties. On September 29, 1995, the District Court entered a Memorandum Opinion and Order granting judgment to Lincoln and against Silver and ADSP on all counts. Judgment was entered on April 9, 1996. Silver then appealed to the Court of Appeals for the Seventh Circuit, which affirmed the judgment in an unpublished, per curiam opinion dated May 15, 1997. *Lincoln National Life Insurance Company v. Silver*, 1997 U.S. App. LEXIS 11926. Silver filed a timely Petition for Rehearing En Banc that was denied on June 9, 1997.

REASONS FOR DENYING THE WRIT

I.

SILVER'S PETITION SHOULD BE DENIED BECAUSE THE SEVENTH CIRCUIT DECISION TURNS ON ITS OWN FACTS AND WILL AFFECT FEW OTHER THAN THE LITIGANTS.

Putting aside the fact that Silver's claim of a conflict between the Circuits is not correct, this case simply does not merit review by this Court. The Seventh Circuit's unpublished, per curiam Order in this case has no value as precedent in the Seventh Circuit. Seventh Circuit Rule 53. Moreover, the Seventh Circuit expressly decided the question presented on the basis of the "unique facts presented by this case". *Lincoln*, 1997 U.S. App. LEXIS 11926, p. 9. Unique facts preclude a conflict.

Silver incorrectly suggests that *Daniel International Corp. v. Fischbach & Moore*, 916 F.2d 1061 (5th Cir. 1990), conflicts with the Seventh Circuit's ruling in this case. *Daniel* actually supports the Seventh Circuit's ruling because it holds that a party who fails to file a jury demand within 10 days of the last pleading waives the right to a jury trial under Rule 38. *Id.* at 1064. *Daniel* did uphold the defendant's right to a jury trial — noting a lack of disruption to the district court's calendar and the lack of prejudice to the plaintiff — under Fed. R. Civ. P. 39(b). *Id.* at 1065.[4]

The decision to grant or deny a motion for a jury trial under

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4. Rule 39(b) provides that "notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury on any or all issues." Fed. R. Civ. P. 39(b).

Rule 39(b) is discretionary and depends on the facts of each case. *Ma v. Community Bank*, 686 F.2d 459, 470 (7th Cir. 1982), *cert. denied*, 459 U.S. 962 (1982); *Daniel* at 1064 (listing factors relevant for consideration). Nothing in *Daniel* shows that that Court would decide this case any differently than the Seventh Circuit did.[5]

II.

SILVER'S PETITION SHOULD BE DENIED BECAUSE HIS QUESTION PRESENTED RELIES ON AN INCORRECT ASSUMPTION, WHICH WAS REJECTED BY THE SEVENTH CIRCUIT.

Silver's statement of the question presented assumes that his jury demand was filed within 10 days of the last pleading directed to any issues triable by a jury. Silver requests the issuance of a writ of certiorari to review the question of:

> Whether a Constitutional right to a trial by jury should be granted on all issues triable of right to a jury, if the jury demand is contained in a compulsory counterclaim filed within 10 days of the last pleading (which pleading is a reply, extended by the court, to one count out of several) is filed prior to an amended pleading that alleges RICO claims, seeking statutory damages, is a general demand, is continually on the Docket, is

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5. Further, Silver's jointly liable co-defendant in this case, ADS Partners, L.P. ("ADSP") never appealed the judgment of the District Court. The judgment is thus final as to ADSP. Because Silver was the general partner of ADSP he is personally liable for any amounts unsatisfied by ADSP. Therefore, any relief granted to Silver by this Court would be moot.

> never moved to be stricken, is not prejudicial to respondent, and is never waived.

Petition at i. An answer to this question will not resolve the issue decided by the Seventh Circuit. The question before the Seventh Circuit was whether, in fact, the jury demand was filed within 10 days of the last pleading. Silver's hypothetical question was already answered by the Seventh Circuit in its Order:

> Silver relies heavily on the proposition that a general jury demand must be construed as a jury demand as to all issues triable by a jury. As a general matter, he is quite correct in this statement of the law. . . . Had Silver's June 1, 1987 jury demand been timely, the Rule would plainly have had some effect; however, there is no authority for the proposition that an untimely jury demand constitutes a valid jury demand for all issues so triable including those for which the right to a jury trial has been waived by virtue of the defendant's failure to timely demand such a trial.

Lincoln at U.S. App. LEXIS 11926, p. 10. Silver does not (and cannot) argue that in answering this question the Seventh Circuit's Order conflicts with the decisions of other Circuits. [6]

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6. Fed. R. Civ. P. 38 states in relevant part:

> (b) **Demand.** Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action

(Cont'd)

III.

SILVER'S PETITION SHOULD BE DENIED BECAUSE THE CASES CITED BY SILVER DO NOT DEMONSTRATE A CONFLICT AMONG THE CIRCUITS AS TO THE QUESTION WHICH RESOLVED THIS CASE.

The cases cited by Silver are not in direct conflict with the Seventh Circuit's holding in this case. All are consonant with the proposition that the issue contemplated by Rule 38(b) is one of fact and an issue of fact exists when a factual allegation is denied. Silver incorrectly claims that the decision in *Bentler v. Bank of America*, 959 F.2d 138 (9th Cir. 1992), is in direct conflict with the Seventh Circuit's ruling. The *Bentler* court held that where defendants are jointly liable on a cause of action, the last pleading directed to any issues triable by a jury is the answer filed by the last jointly liable defendant. *Id.* at 141.[7]

United States v. Anderson, 584 F.2d 369 (10th Cir. 1978), another case Silver claims is in direct conflict with the Seventh

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(Cont'd)

> and not later than 10 days after the service of the last pleading directed to such issue . . .
>
> (d) **Waiver.** The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by the party of trial by jury . . .

Fed. R. Civ. P. 38(b) and (d).

7. There was no counterclaim in *Bentler*. In that case, the court merely analogized to situations involving compulsory counterclaims. *Bentler* at 141. *Bentler* did not rule on the issue decided by the Seventh Circuit.

Circuit's decision, also does not decide the question presented to the Seventh Circuit. In that case, the defendant filed a counterclaim *with his answer* and the plaintiff filed a motion to dismiss it. While the motion was still pending, the defendant filed a jury demand. The court upheld the jury demand, ruling that the issues would not be joined and the time to file a jury demand under Rule 38(b) would not begin to run until the reply to the counterclaim itself was filed. *Id.* at 372. Another case relied upon by Silver, *Dasho v. Susquehana Corporation*, 461 F.2d 11 (7th Cir. 1972), also presented a question involving a counterclaim filed with the answer. In *Dasho*, the court held that a reply to the counterclaim serves as the last pleading even if the reply is untimely filed. *Id.* at 22.

These cases do not conflict with the holding of the Seventh Circuit: that Silver's Answer, which did not include a counterclaim, addressed all material allegations of the complaint and was the last pleading directed to the issues because his motion to dismiss merely asserted an affirmative defense. As the Seventh Circuit stated:

> As this Court has observed on many occasions, the Rules of Civil Procedure do not require plaintiffs to separately denominate counts in their complaints, with each such count corresponding to a particular statute or legal theory. (citation omitted). Here the fact that Silver did not specifically answer the particular allegations contained in a separately denominated count (Count IV) until six months after he had answered materially identical allegations was entirely an incidental consequence of the manner in which Lincoln structured its complaint. Thus if Lincoln had simply set forth all of its

> factual allegations and concluded with an appropriate prayer for relief, Silver would have answered all such allegations and this artificial splitting of the answer would never have occurred. . . . On the unique facts presented by this case, we conclude that all issues raised in Lincoln's complaint were joined by Silver's December 1, 1986, answer. Therefore, a jury demand contained in his counterclaim, filed six months later, was untimely as to those issues and was properly denied.

Lincoln, 1997 U.S. App. LEXIS 11926, pp. 9-10. Thus, Silver has not demonstrated a conflict among the circuits. Indeed, consonant with Silver's authorities, the Seventh Circuit recognized that Silver's jury demand would have applied to all jury issues raised in the complaint, if only he had filed it on time.

Further, Silver's question to this Court does not contemplate that his Counterclaim was the last pleading directed to any issues triable by a jury. Even if he had, the cases cited by Silver on this point create no conflict because they are readily distinguishable on their facts. Silver filed his counterclaim six months after his original answer — not with his answer as required by the rules. Fed. R. Civ. P. 12(b).

The Seventh Circuit followed the well-established precedent that "under Rule 38 amendments or supplemental pleadings do not extend the time for making a demand for jury trial except as to new issues raised by the new pleadings." *Communications Maintenance, Inc. v. Motorola, Inc.*, 761 F.2d 1202, 1208 (7th Cir. 1985). Thus, a subsequently filed counterclaim that contains

a jury demand is only timely with respect to new claims raised in that supplemental pleading and not to previously answered issues. *Id.* As Silver acknowledged during oral argument before the Seventh Circuit, his counterclaim raised no new issues. Even if it had raised new issues, because Silver's counterclaim was dismissed, none remained for a jury when the case was tried.

IV.

LINCOLN'S SECOND AMENDED COMPLAINT DID NOT REVIVE SILVER'S RIGHT TO A JURY TRIAL.

Silver suggests that Lincoln's Second Amended Complaint is relevant to the question in his Petition and relies on *Rosen v. Dick*, 639 F.2d 82 (2nd Cir. 1980). However, *Rosen* and its progeny concerned the extent to which other parties could rely upon a timely jury demand. And contrary to Silver's assertion, some dicta in *Rosen* supports the denial of this Petition. The *Rosen* court found that a jury demand as to subsequent pleadings covers only new issues raised in those pleadings and not earlier issues for which the time to request a jury has passed. *Rosen*, 639 F.2d at 91, *see also Trixler Brokerage Co. v. Ralston Purina Co.*, 505 F.2d 1045, 1050 (9th Cir. 1974) (presentation of a new theory of recovery, especially if based on the same facts, does not constitute the presentation of a new issue); *Richardson Greenshields Securities, Inc. v. Mui-Hin Lau, et al.*, 693 F. Supp. 1445, 1457- 1459 (S.D.N.Y. 1988) (amendments to the pleadings revive the right to a jury trial only if they involve new issues or change the original issues).

Silver argues that statutory damage cases *must* be decided by a jury according to United States Supreme Court precedent, citing, among other cases *Tull v. United States*, 481 U.S. 412 (1987), *Curtis v. Loether*, 415 U.S. 189 (1974) and *F.W.*

Woolworth Co. v. Contemporary Arts, 344 U.S. 228 (1952).[8] Petition at 19-22. *Tull* and *Curtis* merely hold that the right to a jury trial extends to the causes of action arising under, respectively, the Clean Water Act, 33 U.S.C. § 1251, *et seq*, and Section 812 of the Civil Rights Act of 1968, 42 U.S.C. § 3612.[9] The Seventh Amendment provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved." It does not *require* that all cases be tried by a jury. *Burns v. Lawther*, 53 F.3d 1237, 1240 (11th Cir. 1995) (Seventh Amendment right to a civil jury is not absolute and may be waived); *see also LaMarca v. Turner*, 995 F.2d 1526, 1544-45 (11th Cir. 1993), *General Tire & Rubber Co. v. Watkins*, 331 F.2d 192, 197 (4th Cir. 1964), *cert. denied*, 377 U.S. 952 (1964). A party requesting a jury trial must still make a timely demand. As the District Court and Seventh Circuit found below, Silver failed to make a timely request for a jury.

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8. Silver's citation to *F.W. Woolworth* to support his Petition is wrong. The right to a jury trial was not an issue in that case. Further, the quotation ascribed to that case is not in the published opinion.

9. In *Tull v. United States*, the question was whether the Seventh Amendment guaranteed the *right* to a jury trial in an action arising under the Clean Water Act, 33 U.S.C. § 1251, *et seq.* 481 U.S. at 414. This Court held that such a cause of action is analogous to an action in debt within the jurisdiction of the English courts of law prior to the enactment of the Seventh Amendment. Thus, "the Seventh Amendment required that petitioner's *timely demand for a jury trial* be granted." *Id.* at 427 (emphasis added).

Similarly, in *Curtis v. Loether* the question was whether the Seventh Amendment applies "to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." This Court held that "the Seventh Amendment entitles either party to *demand a jury trial* in an action for damages in federal court under § 812." 415 U.S. at 192 (emphasis added).

That RICO allows for the recovery of statutory damages does not trump the fact that Silver failed to timely request a jury trial.

CONCLUSION

The Seventh Circuit's ruling, affirming the District Court's denial of Silver's motion for a jury trial, does not create a direct conflict among the Circuits upon the question presented. Silver's petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — RELEVANT DOCKET ENTRIES

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY v. A. DAVID SILVER
DOCKET

DATE	NR	PROCEEDINGS
10/01/86	5	Filed 09/29/86: Amended Complaint of Plaintiff. Issued 09/29/86 alias summons and 4 copies
10/24/86	9	Filed 10/22/86: Return of Service of Summons and Complaint returned SERVED as to A. David Silver by certified mail receipt #P256 150 660 on 10/16/86.
	10	Filed 10/22/86: Return of Service of Summons and Complaint returned SERVED as to ADS PARTNER L.P. by certified mail receipt #P256 150 659 on 10/16/86.
	11	Filed 10/22/86: Return of Service of Summons and Complaint returned SERVED as to Santa Fe Private Equity Fund II by certified mail receipt #P 256 150 658 on 10/16/86.
11/17/86	16	Minute order of 11/13/86: Plaintiff given leave to file motion for preliminary injunction. Defendant to file answering memorandum and motion to transfer by November 28, 1986. Plaintiff's reply/answering memorandum to be filed by December 12, 1986. Final reply to be filed by defendant on December 19,

Appendix A

DATE	NR	PROCEEDINGS
		1986. Status hearing held and continued to January 12, 1987 at 9:30 a.m. — GETZENDANNER, J. Notices mailed 11/17/86.
11/21/86	19	Filed 11/18/86: Appearance of Robert K. Blain and David O. Toolan for defendants.
11/21/86	20	Filed 11/18/86: Rule 39 Affidavit of Robert K. Blain.
11/21/86	21	Filed 11/18/86: Rule 39 Affidavit of David O. Toolan.
11/21/86	23	Minute order of 11/19/86: Defendants Silver, ADS Partners and Santa Fe Private Equity Fund II are given to December 1, 1986 to answer certain counts of the Amended Complaint. Previously set briefing schedule to stand on the motion to dismiss transfer. — GETZENDANNER, J. Notices mailed 11/21/86.
11/21/86	24	Filed 11/17/86: Defendant's notice of motion and motion for extension of time to answer.
	25	Filed 11/17/86: Defendant's notice of motion and motion to dismiss
12/03/86	26	Filed 12/01/86: Defendants' notice of filing; Memorandum in support of motion to dismiss

Appendix A

DATE	NR	PROCEEDINGS
		count IV and in support of motion to transfer venue; Exhibit A; Attachment.
12/04/86	27	Filed 12/01/86: Defendants' A. David Silver, ADS Partners, L.P., and Santa Fe Private Equity Fund II, L.P.'s ANSWER to amended complaint; Notice of filing
01/15/87	42	Minute order of 01/13/87: Defendants' motion to transfer and to dismiss count IV are denied without prejudice to renewal at a later date on a fuller factual record. For further details see order attached to the original minute order form. — GETZENDANNER, J. Notices mailed 01/15/87
MN	43	Enter order of 01/13/87: Memorandum opinion and order.
01/30/87	44	Minute order of 01/26/87: Defendant Santa Fe Private Equity Fund II given to February 4, 1987 to file counterclaim. — GETZENDANNER J. Notices mailed 01/30/87.
02/05/87	51	Filed 02/04/87: Notice of Filing; COUNTERCLAIM w/Exhibit A attached.
04/21/87	56	Minute order of 04/20/87: Attorneys Robert Blain and David Toolan given leave to withdraw as counsel for defendants Silver,

Appendix A

DATE	NR	PROCEEDINGS
		ADS Partners L.P. and Santa Fe Private Equity Fund II, L.P. Defendants Silver and Sante Fe Private Equity Fund II, L.P. shall have retained new counsel by May 7, 1987 and the new counsel shall appear on May 7, 1987 at 9:30 a.m. Status hearing re-set for 07 May 87 at 9:30 a.m. Getzendanner, J.
05/08/87	62	Minute order of 05/07/87: Michael Connelly, Joseph Giffin and Mary Gihooly given leave to substitute as counsel for defendants A. David Silver and ADS Partners. Counsel given leave to file their appearances. Defendants' motion for protective order regarding the deposition of Kyle Lefkoff heard. Defendants A. Silver ADS Partner and Santa Fe Private Equity Fund given to May 21, 1987 to answer count 4. Status hearing held and continued to 1 July 87 at 9:30 a.m. Getzendanner, J.
05/22/87	69	Filed 05/21/87: Notice of filing; ANSWER of defendants A. David Silver and ADS Partners, L.P. to Count IV of the Amended Complaint.
05/22/87	70	Minute Order of 05/22/87: Defendants A. David Silver and ADS Partners motion for an extension of time to June 1, 1987 to file counterclaims is granted. Getzendanner, J.
05/22/87	71	Filed 05/20/87: Notice of motion; Motion of

Appendix A

DATE	NR	PROCEEDINGS
		defendants for extension of time to file counterclaims.
06/03/87	72	Filed 06/01/87: Defendants notice of filing; COUNTERCLAIM of defendants-counterclaimants A. David Silver and ADS Partner, L.P.; Jury demand; Exhibit A.
08/26/88	129	Filed 08/25/88; SECOND AMENDED COMPLAINT.
09/22/88	141	Minute order of 09/21/88: Court grants Sarah R. Wolff, David J. Meadow and Charles J. Ryan leave to file their substitute appearances for defendants A. David Silver and ADS Partners replacing Michael Connelly, Joseph Giffin and Mary C. Gilhooly of Chadwel & Kayser. Nordberg, J. Mailed notice 09/22/88.
09/22/88	143	Filed 09/21/88. Appearance of Sarah R. Wolff., Charles J. Ryan, and David R. Medow as substitute counsel for defendants A. David Silver and ADS Partners.
10/25/88	162	Filed 10/24/88: Defendant A. David Silver's notice of filing; ANSWER TO SECOND AMENDED COMPLAINT.